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No. 04-849

IN THE
Supreme Court of the United States

SHERRI WILLIAMS, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED
(Restated)

Does a state restriction on the sale of sexual devices that "exempts sales of sexual devices 'for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose,' " Pet. App. 197a (quoting Ala. Code § 13A-12-200.4), and does not in any event apply to the use, possession, importation, or gratuitous distribution of such devices, violate substantive due process?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

Section 13A-12-200.2(a)(1) of the Code of Alabama 1975, as amended, provides:

> It shall be unlawful for any person to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value. Material not otherwise obscene may be obscene under this section if the distribution of the material, the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of prurient appeal. Any person who violates this subsection shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than ten thousand dollars ($10,000) and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than one year. A second or subsequent violation of this subdivision is a Class C felony if the second or subsequent violation occurs after a conviction has been obtained for a previous violation. Upon a second violation, a corporation or business entity shall be fined not less than ten thousand dollars ($10,000) nor more than fifty thousand dollars ($50,000).

Ala. Code § 13A-12-200.2(a)(1) (Supp. 2004).

Section 13A-12-200.4 of the Code of Alabama 1975, as amended, provides:

> It shall be an affirmative defense to a charge of violating Sections 13A-12-200.2 and 13A-12-200.3 that the act charged was done for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose.

Ala. Code § 13A-12-200.4 (1994).

STATEMENT

In 1998, the Alabama legislature amended the Alabama Anti-Obscenity Enforcement Act, Ala. Code §§ 13A-12-200.1 to 13A-12-200.12 (1994 & Supp. 2004), to prohibit the distribution of "any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value." Ala. Code § 13A-12-200.2(a)(1) (Supp. 2004). Petitioners sued the Attorney General of Alabama, challenging the constitutionality of the prohibition on the sale or distribution of such "sexual devices."[1]

1. *Williams I.* Plaintiffs (Petitioners here) filed their original complaint on July 29, 1998. The parties entered into a lengthy stipulation of facts, and the case was tried on the stipulations and the parties' written and oral arguments to the district court. The following year, the district court invalidated the statute. *Williams I*, Pet.

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[1] Consistent with the terminology used by the courts below, Respondent "adopt[s] the district court's usage of the shorthand term 'sexual device' in place of the cumbersome phrase 'device designed or marketed as useful primarily for the stimulation of the human genital organs.'" *Williams II*, Pet. App. 79a n.1.

App. 1a–77a. "After considering Supreme Court precedent," the district court determined that

> the statute does not implicate previously recognized fundamental constitutional rights. The court also declined to extend those rights to provide a fundamental right to the use of sexual devices, a right that would be burdened by the statute. The district court next reviewed the statute under rational basis scrutiny and concluded the statute lacked a rational basis. The court accordingly held the statute unconstitutional and issued a permanent injunction against its enforcement.

Williams II, Pet. App. 80a (citations omitted). The Attorney General of Alabama appealed the district court's decision to the Eleventh Circuit.

2. *Williams II.* The Eleventh Circuit reversed and remanded. *Williams II*, Pet. App. 78a–97a. After quoting the first sentence of § 13A-12-200.2(a)(1), the court of appeals summarized the relevant facts as follows:

> A first violation is a misdemeanor punishable by a maximum fine of $10,000 and up to one year of jail or hard labor; a subsequent violation is a class C felony. The State has conceded the statute's proscription of the distribution of sexual devices in Alabama does not apply to devices acquired as gifts or by purchases in another state. The statute also does not restrict possession or use of a sexual device by an individual, but only the commercial distribution of the devices.
>
> The plaintiffs-appellees are vendors or users of sexual devices. The stipulated facts contain two expert opinions that describe the standard medical and psychological therapeutic uses of sexual devices, including their frequent prescription in marital and non-marital sexual or relationship

> counseling—often as a necessary component for successful therapy. The facts also describe a number of other sexual products the distribution of which is not prohibited by the statute, such as ribbed condoms or the virility drug Viagra.

Pet. App. 79a–80a (citations omitted).

The Eleventh Circuit reversed the district court's determination that the statute was irrational, holding that "[t]he State's interest in public morality is a legitimate interest rationally served by the statute." Pet. App. 84a. Next, the court of appeals affirmed the district court's rejection of Petitioners' facial challenge to the statute. Pet. App. 91a–95a. The court held that "the district court correctly framed the fundamental rights analysis in this case" by "narrowly fram[ing] the analysis as the question 'whether the concept of a constitutionally protected "right to privacy" protects an individual's liberty to use [sexual devices] when engaging in lawful, private, sexual activity.'" Pet. App. 92a (quoting Pet. App. 38a) (second brackets original in *Williams II*). The court then concluded that the statute could be constitutionally applied to the sale of sexual devices to minors and thus was not facially unconstitutional. Pet. App. 95a.

Finally, the Eleventh Circuit remanded Petitioners' as-applied challenge for further factual development. Pet. App. 95a–97a. The Court of Appeals concluded that "the record and stipulations in this case simply are too narrow to permit us to decide whether or to what extent the Alabama statute infringes a fundamental right to sexual privacy of the specific plaintiffs in this case." Pet. App. 96a.

3. *Williams III.* After the case was remanded, Petitioners amended their complaint to add more plaintiffs and enlarge the record for their as-applied challenge. The next day, they moved for summary judgment. The Attorney General answered plaintiffs' amended complaint and

objected to plaintiffs' motion for summary judgment, asking the district court to reopen discovery. The district court denied plaintiffs' motion for summary judgment without prejudice and reopened discovery.

On remand, several additional factual and legal points came to light. First, in their depositions and declarations, Petitioners made clear that each of the user plaintiffs has a bona fide need for sexual devices such that a vendor could sell to them without incurring criminal liability. For instance, Dan Bailey, a 62-year-old man who suffers from erectile dysfunction, stated in his deposition that he has a medical need for the sexual devices he uses. Additionally, he admitted that such devices provide him at least some psychological benefit. Likewise, Mr. Bailey's wife, B.J. Bailey, stated that her use of sexual devices provides her both medical and psychological benefits. Similarly, another married couple, Benny and Deborah Cooper, stated that their use of sexual devices is psychologically beneficial, as did Petitioners Alice Jean Cope and Jane Poe. Like the Baileys, Petitioners Jane Doe and Sherri Williams stated that their individual use of sexual devices serves both medical and psychological purposes. Finally, Petitioner Jane Roe, a woman with extensive physical disabilities, presented perhaps the most compelling case of an individual with a bona fide medical or psychological need for sexual devices.

Second, and relatedly, it became clear, to the extent it was not clear before, that the Anti-Obscenity Enforcement Act permits the distribution of sexual devices for "bona fide medical" and "scientific" purposes. Section 13A-12-200.4 of the Code of Alabama 1975 provides:

> It shall be an affirmative defense to a charge of violating Sections 13A-12-200.2 and § 13A-12-200.3 that the act charged was done for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose.

Ala. Code § 13A-12-200.4 (1994). As Petitioners challenge § 13A-12-200.2 of the Act, the affirmative defense is unquestionably applicable.

Third, the deposition testimony and declarations submitted to the district court established that sexual devices that fall within the statutory prohibition are available just across the state line. In his deposition, Petitioner Dan Bailey acknowledged that sexual devices could be purchased in Tennessee just north of the Alabama state line, a mere six miles from his home. In fact, Mr. Bailey testified that he had visited an adult bookstore in Tennessee, just north of Ardmore, Alabama, that sells sexual devices. Benny Cooper said that he, too, had visited the same establishment and had purchased a sexual device there. Deborah Cooper also stated that she was aware of the Tennessee establishment, and B.J. Bailey testified that she often drove past the store on her way to Pulaski, Tennessee. It is undisputed that § 13A-12-200.2 does not prohibit purchasing sexual devices outside Alabama and bringing them into the State.

Fourth, the facts elicited on remand established that vibrators that do *not* fall within the statutory prohibition remain freely available in Alabama. Alabama's statute does not proscribe the sale of every device that *can* be used to stimulate the human genital organs. Rather, the statute regulates devices "designed or marketed as useful *primarily* for the stimulation of the human genital organs." Ala. Code § 13A-12-200.2(a)(1) (emphasis added). Thus, ordinary vibrators that (although well adapted to uses of a sexual nature) are not designed or marketed as useful primarily for that particular purpose are perfectly lawful in Alabama. These devices include the Hitachi Magic Wand, which one of Petitioners' expert witnesses described as "[o]ne of the most popular masturbatory devices in today's market" and is considered by some to be the "Cadillac" of vibrators. Vibrators that may be sold legally in Alabama also include similar products from

manufacturers such as Conair and Sunbeam. Plaintiffs Jane Doe and Jane Poe both testified that they own and use such devices, which are commonly available at retail stores and via the Internet.

Finally, the plaintiffs testified that they already own numerous sexual devices. It is undisputed that § 13A-12-200.2 does not prohibit the *use* of any sexual devices in the State.

After conducting discovery, the parties filed cross motions for summary judgment. In 2002, the district court granted Petitioners' motion and denied the Attorney General's, again striking down the statutory prohibition on the distribution of sexual devices. *Williams III*, Pet. App. 98a–195a. The court first rejected the Attorney General's arguments on standing. Pet. App. 115a–128a. The court then agreed with Petitioners that the statute was unconstitutional, recognizing a new fundamental "right to sexual privacy." Pet. App. 100a, 128a–194a. The district court entered a final judgment enjoining *any* enforcement of the statutory prohibition. 220 F. Supp. 2d 1257, 1307 (N.D. Ala. 2002). The Attorney General again appealed to the Eleventh Circuit.

4. *Williams IV*. The Court of Appeals again reversed and remanded. Pet. App. 196a–230a. The Court of Appeals framed the issue presented, stating: "In this case, the American Civil Liberties Union ('ACLU') invites us to add a new right to the current catalogue of fundamental rights under the Constitution: a right to sexual privacy. It further asks us to declare Alabama's statute prohibiting the sale of 'sex toys' to be an impermissible burden on this right." Pet. App. 197a (footnote omitted). Ulti-

mately, however, the Eleventh Circuit was "compelled to . . . decline the . . . invitation." *Id.*[2]

The Eleventh Circuit began its analysis by recognizing that the statute in question "proscribes a relatively narrow bandwidth of activity." *Id.* It noted that Alabama only proscribes the sale of sexual devices without criminalizing their use or possession. The court also acknowledged that many other sexual aids are unaffected by the statute and that, in any event, the statute provides an exemption for individuals having legitimate (e.g., medical) needs for sexual devices. *Id.*; *see infra*, at 10.

The court of appeals responded to Petitioners' substantive due process argument first by rejecting the notion that a free-standing "right to sexual" privacy had been recognized in *Lawrence* v. *Texas*, 539 U.S. 558 (2003). Pet. App. 202a–207a. Quoting from its recent decision in *Lofton* v. *Secretary of Department of Children & Family Services*, 358 F.3d 804, 817 (11th Cir. 2004), *cert. denied*, 2005 WL 38782 (U.S. Jan. 10, 2005) (No. 04-478), the court held that "although *Lawrence* clearly established the unconstitutionality of criminal prohibitions on consensual adult sodomy, 'it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right' . . . to all forms of sexual intimacy." Pet. App. 202a–203a.

The Eleventh Circuit next analyzed the right asserted by Petitioners under the two-step framework announced in *Washington* v. *Glucksberg*, 521 U.S. 702 (1997). In doing so, the court of appeals expressly heeded this Court's admonition to "proceed with 'utmost care' " in divining the existence of "extra-textual" constitutional rights. Pet. App. 208a.

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[2] The Court of Appeals affirmed the district court's ruling on Petitioners' standing. Pet. App. 199a n3.

The Eleventh Circuit held that the district court had erred on remand by failing to articulate a "careful description" of the right asserted, as is required under the first prong of *Glucksberg*. The court of appeals found that the district court had "abandoned its initial careful framing of the issue and instead characterized the asserted right more broadly as a generalized 'right to sexual privacy.' " Pet. App. 209a. The court observed that the scope of the right identified by the district court "would theoretically encompass such activities as prostitution, obscenity, and adult incest." Pet. App. 210a. Ultimately, the court of appeals held that the question presented, when properly and narrowly framed, was whether the Constitution protects a fundamental right to use sexual devices. Pet. App. 213a.

The Eleventh Circuit next turned to the second prong of *Glucksberg* to analyze whether the right asserted—that is, to use sexual devices—is " 'deeply rooted in this Nation's history and tradition' " and " 'implicit in the concept of ordered liberty.' " Pet. App. 214a (quoting *Glucksberg*, 521 U.S. at 721). The court of appeals held that the district court had "erred on four levels" in recognizing a free-floating right to sexual privacy. *Id.* First, the district court's analysis, which "consisted largely of an irrelevant exploration of the history of sex in America," was too broad. Pet. App 214a–215a. Second, the district court's analysis gave undue weight to contemporary sexual practices. Pet. App. 215a–217a. Third, the district court erred by searching for historical evidence of state non-interference with the right asserted rather than evidence that the asserted right had been affirmatively protected. Pet App. 217a–220a. Fourth, the district court placed undue reliance on Petitioners' expert testimony while simultaneously misconstruing the State's arguments as conceding material issues. Pet. App. 220a–228a. For all of these reasons, the Eleventh Circuit reversed the judgment of the district court and sustained Alabama's

regulation of sexual devices. Judge Barkett dissented. Pet. App. 231a–249a.

ARGUMENT

I. Petitioners Ignore the Narrow Scope of the Restriction at Issue.

Throughout their Petition, Petitioners proceed as though this case involved a blanket ban on the sale of sexual devices in Alabama. It does not. Indeed, the Eleventh Circuit took great pains to define the precise scope of the restriction in § 13A-12-200.2 at the very outset of its decision. In just the third paragraph of its opinion, the court stated:

> The Alabama statute proscribes a relatively narrow bandwidth of activity. It prohibits only the sale—but not the use, possession, or gratuitous distribution—of sexual devices (in fact, the users involved in this litigation acknowledge that they already possess multiple sex toys). The law does not affect the distribution of a number of other sexual products such as ribbed condoms or virility drugs. Nor does it prohibit Alabama residents from purchasing sexual devices out of state and bringing them back into Alabama. Moreover, the statute permits the sale of ordinary vibrators and body massagers that, although useful as sexual aids, are not "designed or marketed . . . primarily" for that particular purpose. Finally, the statute exempts sales of sexual devices "for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose."

Pet. App. 197a (citation omitted) (quoting Ala. Code §§ 13A-12-200.2(a)(1) & 13A-12-200.4).

This careful (and accurate) description of the narrow scope of the restriction at issue underlies the remainder of

the Eleventh Circuit's opinion. Rather than engage the court of appeals' analysis, Petitioners have opted to attack the straw man of a blanket ban. Notably, Petitioners do not quote, discuss, distinguish, or even cite the Eleventh Circuit's description of the "narrow bandwidth of activity" proscribed by the restriction on the sale of sexual devices at issue. Petitioners essentially (and unfairly) caricature the court of appeals' decision, and then use that caricature as the premise for their assertion of conflict and confusion in the lower courts. This Court should not be misled.

II. Petitioners' Asserted Conflict in the Lower Courts is Illusory.

Petitioners assert that the Eleventh Circuit's decision conflicts with decisions from other lower courts. They discuss three state-court decisions: *State* v. *Brenan*, 772 So. 2d 64 (La. 2000); *State* v. *Hughes*, 792 P.2d 1023 (Kan. 1990); and *People* v. *Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985). Each of these cases involved across-the-board bans on the sale of sexual devices that—unlike Alabama's statute—did *not* make exceptions for legitimate medical and therapeutic uses. Because of the narrow scope of the Alabama restriction, the alleged conflict with these decisions is illusory.

In *People* v. *Seven Thirty-Five East Colfax, Inc.*, the Supreme Court of Colorado struck down a "*blanket* proscription of *all* devices 'designed or marketed as useful primarily for the stimulation of human genital organs.' " *Id.* at 370 (emphasis added) (quoting Colo. Rev. Stat. § 18-7-101(3) (Supp. 1984)). According to the court, this "statutory scheme, in its present form, impermissibly burdens the right of privacy *of those seeking to make legitimate medical or therapeutic use of such devices.*" *Id.* (emphasis added). Again referring to "legitimate medical or therapeutic use of such devices," the court concluded that Colorado had "demonstrated no interest in the broad

prohibition of these articles sufficiently compelling to justify the infringement on the privacy right of those seeking to use them in legitimate ways." *Id.* Plainly, the Colorado Supreme Court's decision was based on the Colorado statute's "blanket proscription" of even "legitimate medical or therapeutic use" of sexual devices—uses exempted from Alabama's restriction.

The Supreme Court of Kansas followed the Colorado court's reasoning in *State* v. *Hughes*. The Kansas court "agreed with the opinion in *Seven Thirty-Five* that a statute is impermissibly overbroad when it impinges without justification *on the sphere of constitutionally protected privacy which encompasses therapy for medical and psychological disorders*." 792 P.2d at 1031 (emphasis added). The court concluded "that the federal government recognizes a legitimate need for the availability of [sexual] devices." *Id.* (citing 21 C.F.R. §§ 884.5940 & 884.5960 (1989)). The court then held "the dissemination and promotion of such devices *for purposes of medical and psychological therapy* to be a constitutionally protected activity." *Id.* at 1032 (emphasis added). Because "*the legislature made no provision for such acts*, those sections dealing with obscene devices were properly found to be overbroad and unconstitutional." *Id.* (emphasis added). As in *Seven Thirty-Five East Colfax*, the Kansas decision was based entirely on the statute's application to medical and therapeutic uses of sexual devices—uses that are exempt from the Alabama restriction.

Finally, in *State* v. *Brenan*, the Supreme Court of Louisiana struck down that State's ban on sexual devices as irrational. 772 So. 2d at 72–76. The court repeatedly referred to it as an "unqualified ban," *id.* at 73, 75, noting that "it is clear that the legislative basis for the enactment of R.S. § 14:106.1 was the suppression of *all* obscene devices." *Id.* at 73. The court called attention to the dramatic differences between the ban on obscene sexual devices and Louisiana's general obscenity statute, La.

Rev. Stat. § 14:106, observing that the sexual device statute contained no exception for medical personnel and calling it simply "a *blanket* ban of *all* devices designed or marketed as useful primarily for the stimulation of human genital organs regardless of the entity promoting them." *Id.* at 74 (emphasis added). The court emphasized that this "unqualified ban on sexual devices ignores the fact that, in some cases, the use of vibrators is therapeutically appropriate" and discussed the federal regulation of such devices. *Id.* The court then expressly based its conclusion that the "blanket ban" was irrational on the failure to allow for such therapeutic uses: "*Given these therapeutic uses*, we cannot say that the State's actions in banning all devices that are designed or marketed primarily for the stimulation of the human genitals without any review of the prurience or medical use is rationally related to the 'war on obscenity.'" *Id.* at 76 (emphasis added). Although the court's reasoning differed from that in the Colorado and Kansas decisions, the key to ruling was again the failure to provide for legitimate medical and therapeutic uses of sexual devices—uses allowed under Alabama's statute.

All three of the decisions cited by Petitioners were based on legislative attempts to enact "blanket bans" on sexual devices that failed to provide for legitimate medical and therapeutic uses. As the Eleventh Circuit recognized, Alabama's restriction on the sale of sexual devices cured that arguable defect, so that "the statue exempts sales of sexual devices 'for a bona fide medical, scientific, [or] educational . . . purpose.'" Pet. App. 197a (quoting Ala. Code § 13A-12-200.4). Because Alabama's restriction on the sale of sexual devices permits sales for legitimate medical and therapeutic uses of such devices, it is materially different from the "blanket bans" addressed in the Colorado, Kansas, and Louisiana decisions. In the light of this difference, it becomes clear that there is no conflict

between the decision below and the decisions cited by Petitioners.

III. Petitioners Misinterpret the Holding in *Lawrence* v. *Texas*.

Petitioners also fault the court of appeals for, they say, treating this Court's decision in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), as though it "does not control the fundamental rights analysis and confirm a substantive due process right to sexual privacy." Pet. at 19. Petitioners contend that "a substantive due process right to sexual privacy" is "the very right that was affirmed in *Lawrence*." *Id.* With respect, Petitioners are mistaken.

In *Lawrence*, this Court did not purport to recognize private, consensual, adult homosexual conduct as a fundamental right for substantive due process purposes. As the dissent there noted:

> Not once does [the Court] describe homosexual sodomy as a "fundamental right" or a "fundamental liberty interest," nor does it subject the Texas statute to strict scrutiny. Instead, having failed to establish that the right to homosexual sodomy is " 'deeply rooted in this Nation's history and tradition,' " the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test, and overrules *Bowers*' holding to the contrary.

539 U.S. at 594 (Scalia, J., dissenting) (citation omitted).

Given this Court's own reticence to recognize a fundamental right to even *one* particular form of private sexual conduct between consenting adults, the district court clearly erred in creating a fundamental right to *all* forms of private, consensual sexual conduct. Thus, *Lawrence* actually confirms that the district court erred in recognizing a generalized, fundamental "right to sexual

privacy" and that the Eleventh Circuit was correct to reverse that holding.

The decision in *Lawrence* likewise confirms that the standard to be applied in this case is rational-basis scrutiny. After expressly overruling *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), the Court in *Lawrence* stated its holding in a single sentence: "The Texas statute furthers no *legitimate* state interest which can justify its intrusion into the personal and private life of the individual." 539 U.S. at 578 (emphasis added). Under rational-basis scrutiny, the " 'test of due process' " is "a *legitimate* legislative purpose furthered by rational means." *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992) (emphasis added) (quoting *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984)). The Court's reference in *Lawrence* to the absence of any "legitimate state interest," as the dissent pointed out, *id.* at 594, invoked rational-basis review, not the heightened scrutiny required for restrictions on fundamental rights.

Lawrence is relevant here in one final respect. The Court ruled there that the Texas statute criminalizing private, homosexual conduct between two consenting adults "further[ed] no legitimate state interest *which can justify its intrusion into the personal and private life of the individual.*" 539 U.S. 578 (emphasis added). The nature of the "intrusion into the personal and private life of the individual" posed by the Texas statute is also critical to the scope of *Lawrence.* The Texas law criminalized conduct occurring in the privacy of the home between two consenting adults, and it was just such private conduct that led to the arrest of the petitioners in that case. *See id.* at 562–63. The Court noted "that adults may choose to enter upon this relationship *in the confines of their homes and their own private lives* and still retain their dignity as free persons." *Id.* at 567 (emphasis added). In its historical discussion, the Court emphasized the apparent lack of enforcement of sodomy laws "against consent-

ing adults acting *in private*," *id.* at 569 (emphasis added), and the dearth of commentary on "punishing consenting adults for *private* acts," *id.* at 570 (emphasis added).

Just as the Court was careful to point out that *Lawrence* did "not involve minors," it also emphasized that the case did "not involve public conduct or prostitution." *Id.* at 578. The holding in *Lawrence* is thus limited to private, noncommercial[3] activity. *Lawrence* is, by its terms (and rationale), inapplicable to conduct occurring outside the privacy of the home or to commercial activity. Accordingly, *Lawrence* did not purport to overrule this Court's earlier decisions (cited by the Eleventh Circuit in *Williams II*) recognizing that "crafting and safeguarding of *public* morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny." Pet. App. 84a (emphasis added) (citing *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 61 (1973); and *Roth* v. *United States*, 354 U.S. 476 (1957)).

This case involves conduct that is *both* public *and* commercial—the sale of sexual devices to the general public in commercial retail shopping centers (as well as " 'in-house "Tupperware"-style parties,' " Pet. App. 110a (quoting Am. Compl. ¶ 7)). The sale of sexual devices is thus more akin to other sex-based public offenses involving commerce (such as obscenity or prostitution) than to private conduct of the sort at issue in *Lawrence*. This Court has long upheld restrictions on the commercial trafficking of obscenity notwithstanding its recognition of a right to possess obscene materials in the privacy of one's home. *See United States* v. *12 200-ft. Reels of Super 8MM. Film*, 413 U.S. 123, 128–29 (1973); *United States* v.

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[3] "Prostitution" can be defined simply as "commercialized sex." *Black's Law Dictionary* 1268 (7th ed. 1999).

Orito, 413 U.S. 139, 141–44 (1973); *United States* v. *Reidel*, 402 U.S. 351, 355–56 (1971); *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 376–77 (1971) (plurality opinion); *see also Yorko* v. *State*, 690 S.W.2d 260, 264–65 (Tex. Crim. App. 1985) (discussing these cases in upholding Texas restriction on sale of sexual devices).

Section 13A-12-200.2(a)(1) respects the distinction between public commercial conduct and purely private behavior. It forbids only the sale of sexual devices in certain instances and stays out of people's bedrooms. The restriction is constitutional, and the Eleventh Circuit correctly rejected Petitioners' assertion that *Lawrence* indicates otherwise.

CONCLUSION

The petition for a writ of certiorari should be denied.[4]

Respectfully submitted,

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January 21, 2005

[4] In view of this Court's recent denial of certiorari in *Lofton* v. *Secretary of the Florida Department of Children*, No. 04-478, Petitioners' alternative request to hold this case pending a decision in *Lofton*, Pet. at 29, is now moot.